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No. 89-1288 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

SOCORRO GUERRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district judge committed plain error in failing *sua sponte* to recuse himself from ruling on petitioner's motion to vacate her guilty pleas.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-32) is unpublished, but the decision is noted at 891 F.2d 906 (table). The opinion of the district court (Pet. App. 2-19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1989. The petition for a writ of certiorari was filed on January 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On January 7, 1986, petitioner pleaded guilty to one count in each of two separate indictments returned in the United States District Court for the Southern District of Florida.

In the first case, she pleaded guilty to possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); in the second case, she pleaded guilty to conspiring to distribute cocaine, in violation of 21 U.S.C. 846.[1] Petitioner was sentenced to consecutive terms of 20 years' and 15 years' imprisonment. She did not appeal.

Some 22 months later, petitioner filed a motion to obtain a new sentence. She claimed that her lawyer: (1) had made misrepresentations concerning the sentence she would receive, (2) had labored under a conflict of interest, and (3) had failed to read the presentence report. Pet. App. 3. Seven months later, petitioner filed a motion to withdraw her guilty pleas and to go to trial. *Id.* at 3, 21-22. The district court denied that motion (*id.* at 1-19), and the court of appeals affirmed. *Id.* at 20-32.

1. In her motion, petitioner claimed that Luis Casuso, the lawyer who represented her at the time of her guilty pleas, promised that she would not be sentenced to more than 10 to 15 years' imprisonment. Petitioner also alleged that Casuso had a conflict of interest because he had previously represented Bernardo Diaz, who was named a co-conspirator of petitioner's in a superseding indictment. Pet. App. 21-22 & nn.3, 4.

The district court ordered an evidentiary hearing on petitioner's claims. The trial judge, however, canceled that hearing when another judge of the court told him that the FBI and the Marshals Service had learned of a plot to free petitioner from jail. Pet. App. 22 n.2. According to that information, a "hit team" of Colombians was going to enter this country to free petitioner. The district court therefore had petitioner and other witnesses deposed. She did not appear

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[1] The charges against petitioner, a Colombian native, arose from her involvement in the importation of 1,200 pounds of cocaine into Florida and Colorado. Pet. App. 2, 21 n.1.

in court in any later hearings, although her lawyers appeared on her behalf. *Ibid.*

After considering the deposition testimony, affidavits, and other information, the district court denied petitioner's motion to withdraw her guilty pleas. Pet. App. 1-19. The court found that petitioner was an admitted perjurer who would "say whatever is required to win her freedom." *Id.* at 4-5. The court credited the testimony of petitioner's prior attorney, Casuso. The court found that Casuso had enjoyed a "close working relationship" with petitioner, had informed her that she faced a potential sentence of up to 35 years' imprisonment, had not made any promises to petitioner, and had fulfilled all his obligations to his client. *Id.* at 5-6.

The district court also found that petitioner's statements at the time she pleaded guilty supported Casuso's testimony. At that time, petitioner denied that there were any promises beyond the plea agreement, and she denied that there were any "secret deals." Pet. App. 7. She also acknowledged that she understood that the maximum sentence could be 35 years' imprisonment. *Ibid.* Lastly, the court found that Casuso "wholeheartedly advocated for his client and against the interests of Diaz." *Id.* at 8-9. Accordingly, the district court concluded that petitioner's plea was knowing, voluntary, and intentional, and that Casuso did not have a conflict of interest. *Id.* at 9-10.

2. The court of appeals affirmed. Pet. App. 20-32. The court rejected petitioner's argument that the district court was biased against her.[2] The court noted that petitioner had failed to move the district judge to recuse himself under 28

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[2] The court of appeals also rejected petitioner's contention that the trial court abused its discretion in not vacating petitioner's convictions. Petitioner does not renew that claim in this Court.

U.S.C. 455.[3] Pet. App. 27, 28. Thus, the court reviewed petitioner's claim of undue bias under the plain-error standard of Rule 52(b), Fed. R. Crim. P.

The court of appeals held that the district judge did not commit plain error in failing to recuse himself. The court noted that the district judge learned of the escape plan "in his capacity as the presiding judge." Pet. App. 28. As a result, the court said, petitioner had to prove "pervasive bias and prejudice." *Ibid.* According to the court of appeals, petitioner's showing fell far short of that requirement, because the statements in the district court's opinion on which petitioner relied simply "recount[ed] the historical facts of this case and reflect[ed] the reality of the Medellin cartel's operation." *Id.* at 29. Because most of the district court's opinion focused on the testimony and documentary evidence – not on the threat to free petitioner through force – the court of appeals concluded that the district judge did not commit plain error in failing to recuse himself. *Ibid.*

ARGUMENT

Petitioner renews her contention (Pet. 21-29) that the district judge should have disqualified himself under 28 U.S.C. 455 when he learned of the plan to free petitioner from confinement. That fact-specific claim does not warrant further review by this Court.

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[3] Section 455 provides:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> * * * * *

1. The district court advised petitioner's lawyers of the government's awareness of the escape plan and allowed defense counsel to examine a Deputy Marshal about it. Pet. App. 22 n.2, 28, 30 n.9. At the time, however, neither petitioner nor her attorneys hinted that the district judge should have recused himself. Thus, petitioner waived her claim, first raised on appeal, that the district judge should have recused himself when he learned of the possible escape plan. See *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986) ("Counsel, knowing the facts claimed to support a § 455(a) recusal for appearance of partiality may not lie in wait, raising the recusal issue only after learning the court's ruling on the merits."), cert. denied, 481 U.S. 1016 (1987); see also *Stephenson* v. *Paine Webber Jackson & Curtis, Inc.*, 839 F.2d 1095, 1096 n.3 (5th Cir.), cert. denied, 109 S. Ct. 310 (1988); *Oglala Sioux Tribe* v. *Homestake Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983); *United States* v. *Nobel*, 696 F.2d 231, 236-237 (3d Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *Delesdernier* v. *Porterie*, 666 F.2d 116, 121-123 & n.3 (5th Cir.), cert. denied, 459 U.S. 839 (1982).

Rule 52(b) allowed the court of appeals to decide whether, in the absence of an objection, the district judge committed plain error in not recusing himself. A plain error is one that results in "a miscarriage of justice." *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). In light of that high standard, it is clear that the district judge did not commit a plain error in failing to recuse himself. When informed of the possible escape attempt, the district judge prudently gathered evidence through depositions, and he based his decision on the evidence, not the outside threat.

2. Even if petitioner had made a recusal motion, the district judge would not have been required to recuse him-

self.[4] A judge need not recuse himself under Section 455 if his knowledge of the case stems from his official participation in the case. See *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966). Here, the district judge's knowledge of the escape plot was gained in his capacity as the presiding judge in the case. Pet. App. 28. And petitioner does not take issue with the court of appeals' observation that the district court's opinion merely "recount[s] the historical facts of this case and reflect[s] the reality of the Medellin cartel's operation." *Id.* at 29. Under those circumstances, therefore, the district judge plainly did not show the type of bias that required his recusal under Section 455(b)(1). See also *United States* v. *Bond*, 847 F.2d 1233, 1241 (7th Cir. 1988); *United States* v. *Giorgi*, 840 F.2d 1022, 1035 (1st Cir. 1988); *United States* v. *Page*, 828 F.2d 1476, 1481 (10th Cir.), cert. denied, 484 U.S. 989 (1987).

Nor did the district court's knowledge of the escape plot require recusal under Section 455(a), which guards against the appearance of partiality. See *Liljeberg* v. *Health Serv-*

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[4] Petitioner argues (Pet. 26) that the courts of appeals have different standards that they apply to claims of judicial bias. The cases that petitioner cites, however, do not involve claims of recusal under Section 455, and some do not even involve questions of recusal at all. For example, *Menzies* v. *Procunier*, 743 F.2d 281 (5th Cir. 1984), was a collateral attack on a state conviction that dealt with the effect of improper prosecutorial argument. Similarly, *Houston* v. *Estelle*, 569 F.2d 372 (5th Cir. 1978), involved a prosecutor's improper comments at trial, not whether the trial judge should have recused himself. And *Battaglia* v. *United States*, 390 F.2d 256 (9th Cir. 1968), involved a trial judge's awareness of facts in a presentence report. The court held that the judge should either have admitted the report into evidence or should have disregarded its contents; there was no issue of disqualification under Section 455. The only two court of appeals decisions cited by petitioner that dealt with recusal were decided, not under Section 455, but on due process grounds. See *Dyas* v. *Lockhart*, 705 F.2d 993, 996-997 (8th Cir.), cert. denied, 464 U.S. 982 (1983); *Wilks* v. *Israel*, 627 F.2d 32 (7th Cir. 1980), cert. denied, 449 U.S. 1086 (1981).

ices Acquisition Corp., 486 U.S. 847 (1988); *United States* v. *DiPasquale*, 864 F.2d 271, 279 (3d Cir. 1988), cert. denied, 109 S. Ct. 3216 (1989); *United States* v. *Giorgi*, 840 F.2d at 1035-1036. We know of no support for the proposition that the court's knowledge of the possible escape plan was sufficient to give rise to an appearance of bias. We submit that the public would expect that a judge would be kept informed about security matters affecting his courtroom.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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